Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	MM Docket No. 93-25
of the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

OPPOSITION AND COMMENTS OF DIRECTV, INC.

DIRECTV, INC.

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Pursuant to Section 1.429 of the Commission's rules, DIRECTV, Inc. ("DIRECTV")[1] hereby responds to certain petitions for reconsideration of the Commission's order in the above-captioned proceeding[2] implementing Section 25 of the Cable Television Consumer Protection and Competition Act of 1992.[3] DIRECTV strongly opposes the petitions for reconsideration filed by Time Warner Cable ("Time Warner"), the Small Cable Business Association ("SCBA"), the Denver Area Telecommunications Consortium Inc. *et al.* ("DAETC"), and the Center for Media Education ("CME"). DIRECTV also offers comments in support of the jointly-filed petition for reconsideration of the Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS").

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1 DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

2 *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 -- Direct Broadcast Satellite Public Service Obligations*, 13 FCC Rcd 23254 (1999) ("Public Interest Order").

3 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

I. INTRODUCTION AND SUMMARY

With its enactment of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress sought to foster competition in a highly concentrated multichannel video programming distribution ("MVPD") market dominated by cable operators and their vertically integrated programming affiliates. Section 25 of the 1992 Cable Act, codified at 47 U.S.C. § 335, amended the Communications Act of 1934 by directing the Commission to initiate a rulemaking to impose certain public interest obligations on direct broadcast satellite ("DBS") providers.[4] Constitutional challenges to the provision delayed its implementation,[5] and five years elapsed between the Commission's initial notice and comment period and the issuance of the *Public Interest Order*. When the Commission finally promulgated implementing regulations for Section 335, it did so "with a relatively light regulatory hand, picking four percent of capacity as the set-aside requirement and declining generally to impose additional public interest obligations on DBS providers."[6]

Significantly, the absence of over-regulation of the DBS service has begun to have an effect on MVPD competition to the benefit of consumers. According to the Commission's Fifth Annual Report to Congress on the status of competition in the MVPD marketplace, incumbent cable operators still serve approximately 85% of all MVPD subscribers,[7] and the market share of

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4 47 U.S.C. § 335.

5 *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

6 *Public Interest Order, Statement of Commissioner Harold W. Furchtgott-Roth, Dissenting in Part*, 13 FCC Rcd at 23314.

7 In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, CS Docket No. 98-102 (rel. Dec. 23, 1998) ("Fifth Annual Report"), at ¶¶ 6, 8.

franchised cable operators is even higher in many local markets.[8] However, the competitive landscape is beginning to change.

Specifically, cable operators are beginning to feel the competitive pressure exerted by alternative MVPDs, and especially DBS operators. The Department of Justice, after extensive investigation, has concluded that "consumers view DBS and cable as similar and to a large degree substitutable," noting that "[m]ore and more new DBS subscribers in recent years are former cable subscribers who either stopped buying cable or downgraded their cable service once they purchased a DBS system."[9] One major point of differentiation between cable and DBS services, the large initial cost of DBS equipment, "has all but been eliminated" by DBS providers' discounting of receiving equipment and installation rates.[10] And if DBS can continue to grow as it has, some analysts have predicted that the service is on course to capture nearly two-thirds of all new multichannel video subscriptions in the United States[11] through continued vigorous competition with cable.

Such competition can occur only if the Commission continues to pursue policies that promote MVPD competition and specifically, that facilitate DBS growth. The cable industry continues to dominate the MVPD market, and is not taking lightly the competitive threat posed

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8 *See* In the Matter of the Application of MCI Telecommunications Corp. and Echostar 110 Corp., Comments of the United States Department of Justice, File No. SAT-ASG-19981202-00093 (Jan. 14, 1999) ("DoJ Comments"), at 6.

9 *Id.* at 4.

10 *Id.*; *see* Fifth Annual Report at ¶ 63 (predicting that trend of DBS being considered a complete substitute for cable will increase in part "as DBS equipment prices continue to drop"); Fifth Annual Report, Separate Statement of Commission Michael Powell at 2 (noting that "DBS is now very competitively priced, having slashed equipment costs and developed comparable or superior packages of programming").

11 Paul Kagan Associates, *Marketing New Media* (Oct. 19, 1998).

by DBS.[12] Indeed, on the regulatory front, among the numerous petitions for reconsideration filed by parties in this proceeding, none urge revisions more clearly anathema to emerging DBS competition in the MVPD market, and the language and intent of the 1992 Cable Act, than those filed by cable interests.

The Commission considered and fully addressed the Time Warner and SCBA arguments in the *Public Interest Order*. Repetition here does not make them more meritorious. The idea of saddling DBS providers with maximum regulation under Title VI in order to protect cable monopolists from "competitive disadvantage" is absurd, and most of the cable proposals purposely ignore not only key differences between individual MVPD services, but the fundamental fact that cable operators have market power and continue to dominate the MVPD industry. Most importantly, the regulations the cable parties seek to impose have no basis in Section 335. DIRECTV urges the Commission to dismiss these petitions.

DIRECTV also urges the Commission to reject the call of DAETC and CME to impose a number of new political broadcasting and public file requirements on the DBS service. DIRECTV believes that the Commission has struck a sensible policy balance in implementing the new DBS political broadcasting rules in a general fashion, with deference to a case-by-case adjudicatory process that will further refine the applicability and scope of the new rules in specific factual situations. There simply is no need for additional regulation.

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12 For example, the cable industry has mounted aggressive advertising campaigns against satellite-delivered television, including during last year's holiday season. According to analysts, the negative advertising "is proof of one thing: DBS satellite TV is taking customers away from cable TV, and cable TV is worried about it." S. Alexander, *MediaOne takes holiday shot at satellite TV competitors,* Minneapolis Star Tribune (Dec. 18, 1998), at 1D.

Finally, DIRECTV supports the joint petition of APTS and PBS to eliminate the "one-channel-per-programmer" restriction adopted in the *Public Interest Order*. Neither the text of Section 335 nor the policy underlying the 1992 Cable Act supports this artificial limitation on DBS providers' ability to offer their subscribers the best noncommercial educational programming available in the marketplace.

II. THERE IS NO STATUTORY OR PUBLIC POLICY BASIS FOR IMPOSING A PANOPLY OF CABLE-LIKE REGULATIONS ON THE DBS SERVICE

Section 335 gives the Commission statutory authority to impose public service obligations on providers of DBS service. Throughout this proceeding, DIRECTV has supported the Commission's public interest objectives and has advocated requirements that serve these goals effectively without imposing unnecessary burdens on the DBS service. In contrast, the cable industry has sought to place its DBS competitors under a regulatory regime that mirrors Title VI, invoking only the shibboleth of "regulatory parity" as the justification to impose rules on franchises, franchise fees, negative option billing, subscriber privacy, anti-buy-through, must carry, leased access, and program access, among others.[13] In fact, in its Petition for Reconsideration, Time Warner freely admits that its goal -- notwithstanding the acknowledged lack of market power of DBS providers, their "small size" relative to cable operators, and their "lack of incumbency" -- is to saddle DBS operators with "burdensome administrative regulations."[14] This position is insupportable as a matter of statutory interpretation as well as a matter of policy.

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13 Petition for Reconsideration of Time Warner Cable at 11; *see* Comments of the SCBA at 14.

14 *See* Petition for Reconsideration of Time Warner Cable at 7.

The regulations that Time Warner proposes to apply to the DBS service have no basis in Section 335. Neither the text nor the legislative history of Section 335 Act give any indication that Congress wanted the Commission to impose cable-like regulations on providers of DBS services. In fact, the 1992 Cable Act was designed to do just the opposite: it sought to remedy existing competitive disadvantages that alternative MVPDs such as DIRECTV faced relative to cable operators and to encourage their growth. As the Commission observed in the *Public Interest Order*:

> The 1992 Cable Act and its legislative history reflect Congressional concern that horizontal concentration in the cable television industry, combined with extensive vertical integration (*i.e.*, combined ownership of cable systems and suppliers of cable programming), created an imbalance of market power . . . between incumbent cable operators and their multichannel competitors (*e.g.*, satellite providers). This imbalance has limited competition and consumer choice in the MVPD market.[15]

In addition, the notion that DBS and cable television are legally *required* to be regulated similarly is absurd on its face. The Commission correctly pointed out in the *Public Interest Order* that (i) "DBS and cable are separate and distinct services, warranting separate and distinct obligations";[16] (ii) DBS "is a relatively new entrant attempting to compete with an established, financially stable cable industry;"[17] (iii) DBS providers "currently have far less market power than cable operators";[18] and (iv) the justification for the imposition of regulations such as "must-carry obligations, program access rules, channel occupancy limits, syndicated exclusivity, network non-duplication and sports blackout requirements, and leased channel requirements" is

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15 *Public Interest Order*, 13 FCC Rcd at 23278 (citation omitted).

16 *Id.* at ¶ 59.

17 *Id.* at ¶ 60.

18 *Id.*

the result of MVPD "market concentration."[19] Time Warner and SCBA offer no credible reasons for revisiting these findings.[20]

The statutory provisions governing Open Video Service ("OVS") also support differentiated regimes for DBS and cable.[21] In a puzzling analysis of OVS regulation, Time Warner argues that because OVS operators are subject to certain PEG access requirements, Congress intended also to regulate DBS in ways that resemble Title VI.[22] While it is true that OVS operators were made subject to certain Title VI regulations (but not others) when Congress created the OVS regime, Time Warner misses the dispositive point: in enacting the Communications Act's OVS provisions, Congress *expressly* subjected OVS providers to certain Title VI regulations, while in enacting the Act's DBS public interest provisions, it did *not* do so. It is a well-established principle of statutory construction that Congressional inclusion of particular language in one section of a statute, combined with the omission of that language in another section of the same statute, generally means that Congress has acted "intentionally and purposely in the disparate inclusion or exclusion."[23]

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19 *Id.* at ¶ 61.

20 SCBA also would have the Commission reopen the proceeding in order to impose a variety of localism obligations on DBS providers. *SCBA Petition for Reconsideration* at 3. SCBA has not provided a basis for revisiting the Commission's previous rejection of this SCBA argument. *Public Interest Order,* 13 FCC Rcd at 23276 ¶ 54. The Commission should reject SCBA's petition on this point.

21 *See* 47 U.S.C. §§ 571-573.

22 Petition for Reconsideration of Time Warner Cable at 9.

23 *Russello v. United States*, 464 U.S. 16, 23 (1983); *see American Methyl Corp. v. EPA,* 749 F.2d 826, 835-836 (D.C. Cir. 1984).

The fact that there is no statutory basis for the new regulations that Time Warner advocates should end the discussion. Nevertheless, DIRECTV notes that Time Warner's public policy rationale for the imposition of Title VI regulations on DBS providers also provides no support for the regulatory actions it proposes. Simply put, Time Warner's call to "level the playing field"[24] between the cable and DBS industries is ill-conceived and illogical. The Commission does not place cable monopolists at a competitive disadvantage by treating DBS and cable services differently. To the contrary, subjecting DBS to regulations designed for the cable industry will only slow the potential for increased MVPD competition.

Finally, SCBA ironically warns that "increased consolidation" in the DBS industry warrants more strenuous regulation of the DBS service.[25] Six years after enactment of the 1992 Cable Act, cable incumbents continue to dominate the MVPD market. DIRECTV urges the Commission to be wary of regulations advocated by cable incumbents purportedly to serve "public interest" objectives which instead will serve to halt the growth of the cable industry's most effective competitors. Consistent with the mandate and statutory scheme of Section 335, the Commission should continue to foster the development of competition in the MVPD marketplace by maintaining its flexible regulatory approach and rejecting efforts to use this public interest proceeding to impose additional obligations on providers of DBS services.

III. THERE IS NO REASON TO IMPOSE MORE DETAILED DBS POLITICAL BROADCASTING REQUIREMENTS AT THIS TIME

DAETC has petitioned for reconsideration of the Commission's implementation of Section 335(a), which requires the Commission to apply the reasonable access and equal time

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24 Petition for Reconsideration of Time Warner Cable at 3.

25 Petition for Reconsideration of SCBA at 16-18.

requirements of Section 312(a)(7) and Section 315 of the Communications Act, respectively, to DBS providers. The *Public Interest Order* adopted basic rules applying these requirements to DBS,[26] but did not otherwise impose extremely detailed regulations in recognition of the fact that "applying these rules to the DBS service may present difficulties not encountered in the broadcast environment."[27] The Commission instead elected to adopt a case-by-case approach to resolving particular issues involving the application of these political broadcasting requirements to the DBS service as they arise in particular factual situations.[28]

DAETC's reconsideration petition for the most part expresses frustration at the Commission's case-by-case approach to enforcing the political broadcasting requirements, lamenting its "absence of specificity."[29] However, DAETC itself is unable to present a better implementation solution than the one that the Commission has adopted, and for all of the conclusory rhetoric of its petition, fails to show why the Commission has not adopted a legally and administratively sound approach.

First, DAETC's repeated suggestion that it is illegal for the Commission to rely on a case-by-case approach to resolving DBS political broadcasting questions is contrary to one of the most basic principles of administrative law -- that agencies are free to decide whether to

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26 *See id.*, *Appendix B*, 13 FCC Rcd at 23323 (new subsections 100.5(b)(1) and (2) of rules require DBS providers to comply with Section 312(a)(7) by "allowing reasonable access to, or permitting purchase of reasonable amounts of time for, the use of their facilities by a legally qualified candidate for federal elective office. on behalf of his or her candidacy," and to comply with Section 315 "by providing equal opportunities to legally qualified candidates").

27 *Public Interest Order*, 13 FCC Rcd at 23268, ¶ 34.

28 *See id.* at 23268-73.

29 Petition for Reconsideration of DAETC at 3.

formulate policy through rulemaking or adjudication.[30] The principle follows from the structure of the Administrative Procedure Act itself, whose two main procedural sections are entitled "Rulemaking" and "Adjudication."[31] Simply put, the Commission is indeed permitted to "rel[y] on case-by-case decisionmaking to resolve questions" in spite of DAETC's disapproval.[32]

Second, DAETC spends many pages arguing that the Commission has erred legally by not making clear that "DBS operators must give primacy to candidates' needs,"[33] but never explains how the Commission's approach fails to accommodate this principle. DAETC itself quotes the Supreme Court's statement in *CBS, Inc. v. FCC* that Section 312(a)(7) "assures a right of reasonable access to *individual* candidates for elective office, and the Commission's requirement that their requests be considered on an *individualized* basis is consistent with that guarantee."[34] The Commission's emphasis on balancing a number of factors on a case-by-case basis in addressing situations involving reasonable access requests to DBS operators[35] is entirely consistent with Section 312(a)(7)'s emphasis on individualized determinations of such questions.

Third, there is no reason for the Commission to revisit its determination not to impose detailed lowest unit charge ("LUC") obligations upon DBS providers.[36] DAETC disingenuously attempts to manufacture changed circumstances on this point by claiming that DIRECTV "now

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30 *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

31 5 U.S.C. §§ 553-54; *see* J. Lubbers, *A Guide to Federal Agency Rulemaking* 93 (ABA 1998).

32 Petition for Reconsideration of DAETC at 4.

33 *Id.* at 11.

34 *CBS, Inc. v. FCC*, 453 U.S. 367, 390 (1981) (emphasis in original).

35 *See Public Interest Order*, 13 FCC Rcd at 23270.

36 *Id.* at 23273.

offers advertising on cable channels and its exclusively-originated programming," which purportedly justifies the imposition of detailed LUC requirements.[37] This minor amount of advertising carried by DIRECTV does not and should not change the Commission's analysis. DIRECTV explained to the Commission two years ago that "for the *vast majority* of channels that DBS providers carry, the provider exerts no control over program content and does not control the sale of advertising time; in fact, standard programming contracts generally forbid the alteration of programming carried on the DBS system."[38] That statement remains 100% correct today.

Finally, DAETC and CME each urge the Commission to expand the public file requirement for DBS operators. The Commission's current rule requires DBS providers' public files to be available for inspection at the provider's national headquarters.[39] DAETC and CME claim that the Commission should promulgate more detailed rules to facilitate public access to these files.[40]

The Commission should reject this proposal. DAETC and CME have presented no evidence that the reasonable access enforcement process will be impeded by maintaining the current, newly-promulgated rule. Once again, the Commission should resist saddling the DBS service with a multiplicity of detailed broadcast- and cable-based regulatory requirements unless

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37 Petition for Reconsideration of DAETC at 20.

38 Supplemental Reply Comments of DIRECTV, Inc., MM Docket No. 93-25 (May 30, 1997), at 10 (emphasis added).

39 *Public Interest Order*, 13 FCC Rcd at 23271, ¶ 41.

40 Petition for Reconsideration of DAETC at 23; Petition for Reconsideration of CME at 12.

there is a good reason to do so. DAETC and CME have not persuasively explained why the more complicated regulations are preferable in this instance.

IV. THE COMMISSION SHOULD ALLOW DBS PROVIDERS THE FLEXIBILITY TO OFFER SUBSCRIBERS THE BEST NONCOMMERCIAL EDUCATIONAL OR INFORMATIONAL PROGRAMMING AVAILABLE IN MEETING THEIR PUBLIC INTEREST OBLIGATIONS

A. There Is No Statutory Basis For A One-Channel-Per-Programmer Restriction

In implementing the requirement of Section 335(b) that channel capacity be reserved for "noncommercial programming of an educational or informational nature"[41] the Commission has decided to limit to one the number of channels that can be allocated initially to a qualified programmer.[42] The Commission's new rule restricts DBS providers as follows:

> A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.[43]

APTS and PBS have sought reconsideration of this rule, observing that "it has no basis in the statute or factual record of this proceeding, and it does not serve the public interest."[44]

DIRECTV supports the APTS/PBS petition. There is no basis in the language of Section 335 for imposing an initial limit of one channel per DBS system for each qualified programmer. As Commissioner Powell observed in his dissent:

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41 47 U.S.C. § 335(b)(1).

42 *Public Interest Order*, 13 FCC Rcd at 23302, ¶ 116.

43 *Id.* at 23324 (Appendix B, new Section 100.5(c)(4)).

44 APTS/PBS Petition at 2.

> Nothing in the statute indicates that the FCC should go beyond ensuring that DBS operators make capacity available for such programming to also adopt rules about who will provide the programming. Rather, as the DBS operator makes the capacity available to programmers that fall within the category of programmers specified by Congress and those programmers provide the type of programming contemplated by the statute, the congressional intent will be fulfilled. We need go no further.[45]

Commissioner Furchtgott-Roth similarly dissented on this issue:

> I see nothing in the statute that speaks to the question of how space on set aside channels -- once the percentage of channel capacity has been established by the Commission -- should be divvied up or allocated among qualified national educational programming suppliers. And I see nothing in the statute that suggests that the Commission should, by rule, attempt to secure a certain kind of composition or representation on the set-aside as among such suppliers."[46]

DIRECTV agrees with the dissenting Commissioners and APTS/PBS that there is no statutory basis for the rule supported by the majority.

Furthermore, the Commission had no evidence before it that "government intrusion is necessary to ensure diversity and variety" on set-aside capacity.[47] To the contrary, the evidence before the Commission showed that DBS providers have been very successful to date in offering subscribers a variety of quality entertainment, educational and informational programming, and

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45 *Public Interest Order, Separate Statement of Commissioner Michael K. Powell Dissenting In Part*, 13 FCC Rcd at 23316.

46 *Id., Statement of Commissioner Harold W. Furchtgott-Roth, Dissenting in Part*, 13 FCC Rcd at 23314.

47 *Public Interest Order, Separate Statement of Commissioner Michael K. Powell Dissenting In Part*, 13 FCC Rcd at 23316.

there is no reason to assume the same will not be true with regard to the set-aside capacity.[48] There is no public interest served by an artificial regulatory limitation that could have the anomalous effect of forcing DBS providers to deny their subscribers access to more than one offering from a top-quality, experienced provider, and requiring them instead to provide a potentially inferior offering from a different programmer.

If a DBS operator concludes that PBS or some other noncommercial programmer offers the best noncommercial educational and informational programming available and determines that more than one channel should be assigned to that programmer, the Commission should defer to that judgment. It is neither logical nor in the public interest to deprive DBS subscribers of access to quality programming services merely because the services are offered by the same programmer.[49]

B. There Is No Basis For Time Warner's Proposal To Exclude Eligible Programming Already Carried On DBS Services

Time Warner seeks to exclude otherwise eligible programming services, such as C-SPAN if they were being carried by the DBS provider "as of the effective date of the 4% channel capacity reservation rules."[50] There is no basis in the statute for the limitation that Time Warner seeks. Indeed, as Time Warner itself admits, when Congress has intended to impose such a "date-certain" requirement, it has done so expressly in the statutory text.[51] Furthermore, as a

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48 As APTS and PBS correctly observe, "it can be expected that DBS operators will choose to place diverse noncommercial programming on their set-aside channels in order to appeal to as wide an audience as possible." APTS/PBS Petition at 9.

49 *See id.* at 11.

50 Petition for Reconsideration of Time Warner Cable at 12.

51 *Id.* at 15 (discussing 1992 Cable Act amendment of Section 612 providing that cable operators may use 33% of the channel capacity set aside for leased access for the

policy matter, the rule that Time Warner proposes effectively would penalize the DBS industry for carrying noncommercial programming of an educational or informational nature prior to the Commission's establishment of the public interest rules. This makes no sense. It should be rejected.

V. CONCLUSION

DIRECTV does not agree with all of the determinations made in the *Public Interest Order*. On balance, however, the Commission did a reasonable job of interpreting a somewhat unclear statutory provision. DIRECTV believes that the Commission should reject the reconsideration petitions, with the exception of the APT/PBS petition seeking reconsideration of the "one-channel-per-programmer" rule, which should be eliminated as discussed above. The public interest in continued MVPD industry growth and competition will be enhanced by continuing to regulate the DBS industry with a light touch, notwithstanding the efforts of cable incumbents to persuade the Commission otherwise.

Respectfully submitted,

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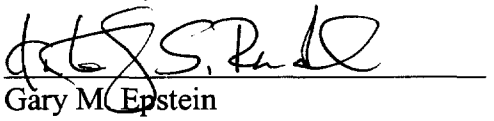
By: 

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provision of programming from qualified minority or educational programming sources, but specifying that no programming provided by a cable system as of July 1, 1990 could qualify for purposes of the subsection); *see* 47 U.S.C. § 532(i)(1).

CERTIFICATE OF SERVICE

I certify that on this 6th day of May, 1999, a copy of the foregoing Opposition and Comments of DIRECTV, Inc. was caused to be delivered via first-class mail, postage prepaid and federal express (*) to the following parties:

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